It was not whether the relationship in which he was found to the booklets amounted to possession. If he was in possession of the booklets and if the booklets were a record of stakes then the presumption contained in section 11 of the Ordinance arose and the onus was placed upon the accused of rebutting it. If possession was not made out, and I do not think it was, the presumption did not arise but the question remained to be considered whether irrespective of possession what the accused was doing amounted to assisting in carrying on a lottery. After all, it is quite possible to do acts in relation to things without giving rise to an inference of *animus possidendi*. For example, if I am found with a pen in my hand in front of the Visitor's Book at King's House a very strong inference arises that I am about to pay my respects to Her Majesty's Representative by inscribing my name. On the other hand there can be no question of my evincing any *animus possidendi* in relation to the book. In the present case, although the accused was not in possession of the booklets, there well might have been evidence which would have given rise to the inference that he was assisting his father to carry on a lottery by doing something in relation to them.

On the evidence to which the learned President actually listened there could be no such inference but when he decided the case on that evidence he had not yet decided whether he would allow further evidence to be given on behalf of the Prosecution.

And that brings me to the first point in respect of which I think he erred. If he had refused to allow the Prosecuting Officer to give evidence and if he had refused to allow an adjournment to enable another expert to be called that, of course, would have been the end of the matter. But if expert evidence as to the nature of the booklets had been given and if the booklets had then been themselves examined in the light of that evidence it may be, I do not say it would be so, but it may be that an entirely different complexion would have been put upon the matter. The learned President would seem to have been greatly impre sed by the consideration that if a small boy finds himself in immediate juxtaposition with a pen and with a piece of paper then by reason of sheer juvenile playfulness he may be tempted to take up the pen and to write upon the paper. That may be true. If, on the other hand, a small boy, and the respondent is not so very small, is found with a pen in his hand and sitting in front of his father's ledger or cheque book and his father is present I should have thought that very different considerations applied. I am not placing the slightest weight on the observation I made at the hearing of the appeal that it seems rather absurd to think that a Chinese boy of 12 living in Perak does not know a great deal about the 100 characters lottery, though it does seem as absurd as to think that a Scots boy of the same age living in the Gorbals of Glasgow does not know a great deal about the activities of street bookmakers. The point is that if the learned President had had the documents explained to him he might well have come to a different conclusion and that he ought not to have come to any conclusion before he had decided whether he would allow them to be explained to him.

In the circumstances, I do not think the order of acquittal and discharge can stand and I am setting it aside. I think I am bound to make an order for re-trial but I would point out that such an order is no bar to the prosecution being withdrawn.

Re-trial ordered.

KALIMUTHU v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) August 5, 1955]

[Ipoh — Criminal Appeal No. 55 of 1955]

Excise Enactment (Cap. 133) — Excise Rules, 1923, r. 101A — Possession of toddy to which there has been added water — Conduct of prosecution by prosecution witness.

This was an appeal against the conviction of the appellant on a charge of possession of toddy to which water has been added. The appellant was the holder of an Excise Licence for the sale of toddy by wholesale. The evidence was that at about 5.20 p.m. on March 14, 1955, officials of the Customs Department, one of whom conducted the prosecution at the trial, visited a retail shop for the sale of toddy. This shop obtained its wholesale supplies from the accused. The shop was closed but on entering it two pint bottles were found contained in a movable box which was closed and sealed with a seal bearing the initials "V.K." which are the initials of the accused. A portion of the toddy in the two pint bottles was removed and on analysis was subsequently found to contain not less than 9% of added water. On these facts, the learned Magistrate convicted the appellant.

Held: there was no evidence to show that the toddy found was in the possession of the appellant and therefore the conviction must be set aside.

Semble: although it is not expressly forbidden by any law to have the prosecution conducted by a person who is also a prosecution witness, this is a course which is open to the very gravest objection.

MAGISTRATE'S CRIMINAL APPEAL.

A. S. Yeo for the appellant.

A. P. Jack (Federal Counsel) for the respondent.

Thomson J. : — The accused in this case appeared before the Magistrate at Tapah on the following charge :—

"That you V. Kalimuthu on 14.3.55 at about 5.30 p.m. at Narborough Estate Toddy Shop, Tapah, being a holder

of a wholesale Toddy Licence No. 6/55 did have in your possession toddy containing not less than 9% of added water, and you have thereby committed an offence under Rule 101A of the Excise Enactment Chapter 133 and punishable under s. 67 of the same Enactment."

He was convicted and fined $50. Against that conviction and sentence he has now appealed.

Before approaching the merits of the case, I would observe that the Prosecution was conducted by a Customs Officer who was also a Prosecution witness. Indeed, he was the principal Prosecution witness. Such a course may not be expressly forbidden by any law but it is one which is open to the very gravest objection. On the one hand, though there is no suggestion that this has happened in the present case, there is always the danger that the witness's evidence may be unconsciously coloured by his attitude as an advocate. On the other hand, and I think this did happen in the present case, an advocate who is also a witness is unable to regard his own evidence with sufficient clarity and detachment. Again, there is always the danger, and, again, I think, this may have happened here though there is no trace of it on the record, there is the danger that things may be said in the course of advocacy that should be but are not given in evidence.

Whatever be the cause, the case fell into a state of very grave confusion and I am satisfied that all parties became so involved in the discussion of a number of largely irrelevant matters that they lost sight of the real issue.

Rule 101A of the Excise Rules, 1923, reads as follows:—

"No licensee and no person employed by a licensee for the collection or sale by wholesale of toddy shall have in his possession any toddy to which there has been added any water, alcohol or sugar."

From the context it is clear that "licensee" in this Rule means "the holder of an Excise Licence for the sale of toddy by wholesale".

Before a conviction can be had for a breach of this Rule, three things must be proved:—

(i) that the Accused was the holder of an Excise Licence for the sale of toddy by wholesale or a person employed by such a licensee for the collection or sale of toddy by wholesale; (ii) that water, alcohol or sugar had been added to the toddy in question in the case; and (iii) that at the material time the toddy was in the possession of the accused.

In the present case there was no doubt that the accused was the holder of an Excise Licence for the sale of toddy by wholesale and the Magistrate was, in my opinion quite rightly, satisfied that the toddy in respect of which the prosecution was brought contained not less than 9 per cent of added water. The only question really in issue, therefore, was whether while it was in that condition it was in the possession of the accused.

Up to a point the facts of the case were not in dispute. About 5.20 p.m. on 14th March, 1955, the Prosecuting Officer accompanied by another functionary of the Customs Department visited the toddy shop on Narborough Estate, Sungkai, which is a retail shop for the sale of toddy obtaining its wholesale supplies from the accused. The shop was closed but on entering it in the company of the salesman no toddy was found except two pint bottles contained in a movable box which was closed and sealed with a seal bearing the initials "V.K.", which are the initials of the accused. A portion of this toddy in the two pint bottles was removed and on analysis was subsequently found to contain not less than 9 per cent of added water.

Now, it is not at all clear from the record what the Prosecution case was. It could, however, have been regarded in one of two ways. Either, on the one hand, it could have been argued that the toddy in the pint bottles when they were found by the Customs Officers was still in the possession of the accused. Or, on the other hand, it might have been proved that this toddy was a sample taken from the toddy supplied by the accused before it passed into the possession of the retailer and that it had not been tampered with in any way. If this had been proved it would have given rise to a very powerful inference that while the toddy was still in the possession of the accused it contained added water.

At the trial, however, it would seem to have been overlooked that there was no evidence to support either of these possible hypotheses for there was no evidence either to support any argument that the toddy in the pint bottles was in the possession of the accused when it was found or to shew that it had been taken from the toddy supplied by the accused while it was still in his possession. There were some rather vague references to some sort of system which was normally and perhaps should have been observed by reason of condition endorsed on the accused's wholesale licence, which was not in evidence. On the evidence as it stands, however, I myself can only form conjectures as to what that system might be and the Magistrate could not have been in any better position unless he was told something by the Prosecuting Officer which was not put in evidence. The truth is that there was nothing in the evidence which gave grounds for anything more than suspicion and it is hardly necessary to observe that suspicion is not proof.

In all the circumstances of the case, I am compelled to set the conviction aside and make an order of acquittal and discharge.

Appeal allowed.

KATAR SINGH v. MANUEL & ANOR.

[A. C. J. (Thomson J.) August 11, 1955]
[Ipoh — Civil Appeal No. 9 of 1954]

Subordinate Courts Rules, 1950, O. 10 — No defence filed — No objection raised at trial — Whether objection can be taken on appeal.

In this case the plaintiff had filed a statement of claim but the defendants did not file their defences. They were however allowed to proceed and make their defences. The principal ground of appeal was that the defendants had not complied with the provisions of Order 10 of the Subordinate Courts Rules relating to the filing of defences.

Held: as the point was not taken at the trial, the appellant cannot raise it at the appeal.

Cases referred to:—

(1) *Davies v. Galmoye* (1888) 39 Ch. D. 322.
(2) *Dyott v. Neville* (1887) W.N. 35.

CIVIL APPEAL.

N. Sharma for the appellant.
Respondents not represented.

Thomson J. (delivering oral judgment) : — The principal ground of appeal in this case is lack of compliance with the provisions of Order 10 of the Subordinate Courts Rules relating to the filing of defences. The plaintiff filed a Statement of Claim and the defendants filed no Defences but at the trial they were allowed to proceed and make their defences.

It is said that this vitiated the proceedings because in the first place non-compliance in itself was in itself sufficient for that purpose and because in the second place the plaintiff was taken by surprise by certain matters raised in evidence by the defendants and that therefore there was a miscarriage of justice.

It would appear from the record that this point was not taken at the trial. I am in very grave doubts as to whether it is even open to the appellant to raise it at this stage. I read from the 1955 *Annual Practice* at page 1251 :—

"An objection to procedure not taken in the Court below was not allowed to be taken in the Court of Appeal"

and the authorities for that are said to be the cases of *Davies v. Galmoye*[1] and *Dyott v. Neville*[2].

In any event, even if it is open to the appellant to take the point now, I think it must fail for two reasons.

In the first place I am of the opinion his failure to take it at the trial amounted to waiver and in the second place I see no reason to suppose that even if he was taken by surprise by the two points to which he refers in the defendants' evidence he was in any way prejudiced. One of these points was in his favour and was an admission against the defendants. The other was a piece of irrelevant abuse of the type that is unfortunately only too common. It had nothing whatever to do with the case.

The whole question resolved itself into a series of questions of credibility. The Magistrate has dealt with the evidence in his Grounds of Judgment very fully and very carefully. I see no reason for interfering with his judgment in any way.

The appeal is dismissed.

Costs to the First Respondent.

There will be no costs to the Second Respondent because he has not been served.

Appeal dismissed.

LOKE YEW MINES LTD. v. EU KENG CHEE & ORS.

[O. C. J. (Wilson J.) August 15, 1955]
[K. L. — Mines Civil Suit No. 3 of 1955]

Mining Enactment (Cap. 147), ss. 16(iii) and 97 — Application for cancellation of mining sub-lease.

Under s. 97 of the Mining Enactment if it is proved that the sub-lessee has failed to observe the conditions referred to in paras. (a), (b), (c) and (d) of sub-s. (ii) of the same section, the lessors are entitled to an order of cancellation unless the sub-lessees can show that there are reasons why the Senior Inspector of Mines or the Court should exercise discretion in favour of the sub-lessee.

MINES CIVIL SUIT.

C. Mills for the complainant.
D. G. Rawson for the respondents.

Wilson J. : — The complainant company is the registered owner of the land held under Mining Lease No. 4181, Portion 1011, in the Mukim of Ampang. The respondents are the executors and trustees of the will and estate of Eu Tong Sen, deceased, and are sued as such. The land was sub-leased to Eu Tong Sen on the 20th November, 1937. Eu Tong Sen died in Hongkong some years ago. The company claims that the respondents have committed breaches of clause 4 of the sub-lease, in that since the 28th May, 1954 they have failed to work the land in accordance with clause 4 of the said sub-lease, and of clause 8(iii) of the sub-lease in that they have not during the six months prior to the date of the complaint employed at least 28 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii) (b) of the Mining Enactment, 1928, for not less than one month in mining the land. For these reasons they ask that the sub-lease may be cancelled.